

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**NEOLAMAE DONALDSON**

Claimant

VS.

**PRESBYTERIAN MANORS**

Respondent

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Docket No. 1,045,734

**ORDER**

Respondent appeals the August 4, 2010, Award of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was found to have suffered permanent injury to her right shoulder, left shoulder and cervical spine as the result of a traumatic incident on February 24, 2009. Claimant was awarded a 21 percent permanent partial functional impairment to the whole body for the injuries. This award was based upon the opinion of board certified physical medicine and rehabilitation specialist George G. Fluter, M.D., who examined claimant on September 24, 2009, at the request of her attorney.

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Gary K. Jones of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on November 19, 2010. E. L. Lee Kinch was appointed as Board Member Pro Tem for the purposes of this appeal.

**ISSUE**

What is the nature and extent of claimant's injuries from her employment with respondent? Respondent argues that claimant's injuries are limited to her bilateral shoulders, with no permanent involvement of her cervical spine and asks the Board to modify the award accordingly. Claimant argues that the Award of the ALJ granting claimant a functional impairment, including both shoulders and her cervical spine,

should be affirmed as claimant suffered permanent disability in all three areas pursuant to the opinion of Dr. Fluter.

#### **FINDINGS OF FACT**

Claimant was working for respondent on February 24, 2009, as a CNA. On that date, while reaching over a patient that claimant was getting ready for bed, claimant experienced pain in her right shoulder and across her back and neck. Claimant continued to work for a short period of time, but the pain worsened and claimant was forced to stop. She reported the incident to her supervisor and was sent to the local emergency room. The next day claimant went to the Ark City Clinic. The initial clinic records from February 25, 2009, indicate right shoulder pain, but no neck pain. The records from the March 12, 2009, visit again indicate right shoulder pain, but do not mention the neck. The March 26, 2009, notes again fail to mention neck pain, but physical therapy notes from March 18, 2009, indicate that claimant had to end the session early due to pain in her shoulder and neck. The final clinic notes from March 30, 2009, indicate complaints in claimant's right shoulder and down into the elbow, but the neck was supple and the C-spine showed no areas of question. It is noted that claimant testified at the regular hearing on February 18, 2010, that she began experiencing pain in her right and left shoulders and her neck and across her back on the date of accident.

Claimant was referred to board certified orthopedic surgeon Pat D. Do, M.D., for an examination on April 28, 2009. At that time, claimant had complaints in her right shoulder and also had neck pain. Dr. Do noted that if the neck pain continued, he would do an evaluation and, if necessary, provide treatment. On May 4, 2009, Dr. Do performed surgery on claimant's right shoulder, repairing a torn rotator cuff. Claimant returned to Dr. Do on May 19 with left shoulder complaints but no neck complaints. Dr. Do examined both shoulders on that date, with the range of motion in the right shoulder being somewhat limited as was expected. Range of motion of the left shoulder was basically normal. An MRI of the left shoulder was ordered. Dr. Do later read the MRI as showing tendinosis but no tear of the rotator cuff was seen. Tendinosis was described as involving a thickening of the tendon with abnormal signal characteristics. Degenerative changes in the AC joint were noted. Physical therapy for the right shoulder was continued, and physical therapy for the left shoulder was ordered.

At the July 15, 2009, examination, claimant underwent a cortisone injection in the left shoulder. Physical therapy for both shoulders was continued. Claimant's cervical spine was not mentioned in the June or July reports. On August 25, 2009, claimant's right shoulder displayed a somewhat limited range of motion. The left shoulder range of motion was almost normal. The cervical spine was not mentioned. Claimant was noted

to have reached maximum medical improvement (MMI), and claimant was released with no restrictions.

In his letter of September 2, 2009, Dr. Do rated claimant pursuant to the fourth edition of the *AMA Guides*<sup>1</sup> at 8 percent impairment to the right upper extremity and 1 percent impairment to the left upper extremity, both at the level of the shoulder. Dr. Do acknowledged that the records from the Ark City Clinic fail to discuss complaints to claimant's neck, although the March 18, 2009, physical therapy notes do.

Claimant was referred by her attorney to Dr. Fluter for an examination on September 24, 2009. Claimant reported pain in her neck, upper back, both shoulders, left arm and both knees. Claimant's cervical range of motion was limited in all planes with pain associated with movement. Claimant also reported altered appreciation of pinprick sensation in her left shoulder and upper arm. During the examination, Dr. Fluter diagnosed taut muscle bands in the area of the upper back and neck. He diagnosed myofascial pain syndrome. His assessment was myofascial pain affecting the neck and upper back, bilateral shoulder pain/impingement with internal derangement of the shoulders and status post right shoulder surgery. Based upon the information provided to him, Dr. Fluter determined that there was a causal relationship between claimant's conditions and her repetitive work-related activities with respondent. Claimant was rated at 5 percent impairment to the whole body for the cervical spine-related myofascial pain syndrome and 15 percent permanent partial impairment for claimant's shoulders bilaterally. The shoulder impairments each equate to a 9 percent whole body impairment. Combining all the whole body impairments results in a 21 percent permanent partial impairment to the whole body.

Dr. Fluter acknowledged that myofascial pain syndrome is not a specific condition listed in the *AMA Guides*. He also acknowledged that there are no objective tests available to diagnose myofascial pain syndrome. However, in his opinion, the condition involves localized muscle spasm and is rated accordingly. He agreed that, in claimant's case, no muscle spasm was present but there was evidence of taut muscles which he considered to be a sign of localized muscle spasm. Dr. Fluter also agreed, on cross-examination, that claimant did not meet the criteria as specifically listed in the DRE Category II of the *AMA Guides*. But claimant did have some loss of range of motion. Dr. Fluter also stated that the *AMA Guides* cannot cover every condition.

Claimant was returned to Dr. Do for an evaluation on November 5, 2009. At that time, claimant was asked to fill out a questionnaire which is entitled "Independent Medical Evaluation Questionnaire." On the questionnaire, when asked to describe the difficulties

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

she was having, the only problem claimant described was “left arm still weak”. The earlier pain drawing, from the November 5, 2009, examination, indicated problems in the left shoulder area only. Right shoulder and neck symptoms were not indicated in either drawing. Dr. Do performed a physical examination on November 5, finding good range of motion of the right shoulder. There were no indications of tenderness in the neck and no evidence of nerve root tension signs from her neck. Dr. Do again determined that claimant had no permanent impairment to the cervical spine and limited her shoulder impairments to 8 percent to the right upper extremity and 1 percent to the left upper extremity, all pursuant to the fourth edition of the *AMA Guides*.<sup>2</sup> It is interesting that Dr. Flutter contends that the *AMA Guides* do not address myofascial pain syndrome but he uses the *Guides* to rate claimant’s neck condition. Dr. Do, on the other hand, appears to acknowledge that the *AMA Guides* may address myofascial pain syndrome, but is not willing to agree that claimant can be rated for her cervical complaints under the *Guides*.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.<sup>4</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>5</sup>

Both claimant and respondent agree that claimant has suffered a permanent injury to her bilateral shoulders. The dispute in this matter centers around the nature and extent of the shoulder injuries and also the permanent impairment or lack thereof with the cervical spine. Dr. Do, the treating physician, found no permanent impairment to the cervical spine due to a lack of physical findings and a history of minimal complaints. Dr. Flutter found significant problems with the neck based on a diagnosis of myofascial

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<sup>2</sup> *AMA Guides* (4th ed.).

<sup>3</sup> K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

<sup>4</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>5</sup> K.S.A. 2008 Supp. 44-501(a).

pain syndrome for which he acknowledges there are no objective tests to verify. The Board is troubled by the lack of contemporaneous complaints while claimant was first being treated at the Ark City Clinic. Additionally, while Dr. Do was willing to provide treatment for the neck if the complaints continued, claimant failed to assert a need for such treatment. Finally, claimant has never been provided nor even requested any medical treatment from any source for her neck complaints. The Board finds that claimant has failed to prove that she suffered an injury to her cervical spine during the incident on February 24, 2009. The award of permanent partial disability benefits by the ALJ for claimant's cervical spine is reversed.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>6</sup>

Claimant has been rated by both Dr. Do and Dr. Flutter for each shoulder. It is troubling that Dr. Flutter would rate the left shoulder, with minimal physical findings, equally with the right shoulder, which is post rotator cuff surgery. However, Dr. Do's ratings appear low considering the length of time and the amount of treatment required for each shoulder. The Board finds that the truth lies somewhere in the middle. For the right shoulder, the Board finds that claimant has suffered a 12 percent impairment of function. For the left shoulder, the Board finds that claimant has suffered an 8 percent impairment of function. The Award of the ALJ is modified accordingly.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to deny claimant an award for the alleged injury to her neck and upper back and further modified to award claimant a 12 percent permanent partial impairment of function for the right upper extremity at the level of the shoulder and an 8 percent permanent partial impairment of function for the left upper extremity at the level of the shoulder. Claimant continues to work at Presbyterian Manors as a CNA. Therefore, the presumption of a permanent total disability under K.S.A. 44-510c has been rebutted.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

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<sup>6</sup> K.S.A. 44-510e(a).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 4, 2010, should be, and is hereby, modified to deny claimant an award for the alleged injury to her neck and upper back and further modified to award claimant a 12 percent permanent partial impairment of function for the right upper extremity at the level of the shoulder and an 8 percent permanent partial impairment of function for the left upper extremity at the level of the shoulder.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Neolamae Donaldson, and against the self-insured respondent, Presbyterian Manors, for an accidental injury which occurred February 24, 2009, and based upon an average weekly wage of \$466.70.

**Right Upper Extremity**

Claimant is entitled to 12.77 weeks of temporary total disability compensation at the rate of \$311.15 per week in the amount of \$3,973.39, followed by 25.47 weeks of permanent partial disability compensation at the rate of \$311.15 per week in the amount of \$7,924.99 for a 12 percent permanent partial disability to the right upper extremity at the level of the shoulder, making a total award of \$11,898.38.

**Left Upper Extremity**

Claimant is entitled to 18.0 weeks of permanent partial disability compensation at the rate of \$311.15 per week in the amount of \$5,600.70 for an 8 percent permanent partial disability to the left upper extremity at the level of the shoulder, making a total award of \$5,600.70.

As of the date of this Award, the entire amounts above awarded would be due and owing and ordered paid in one lump sum, minus amounts already paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant  
Gary K. Jones, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge